Chrishanthini Angela Regina a/p Sebastiampillai v View Esteem Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCvC)(W)-1584–08 OF 2019
HAS ZANAH MEHAT, HADHARIAH SYED ISMAIL AND SEE MEE CHUN JJCA
27 SEPTEMBER 2022

Contract — Housing development contract — Breach — Sale and purchase agreement ('SPA') between developer and house buyer followed statutory form in Schedule H of Housing Development (Control and Licensing) Act 1966 ('the HDA') — Whether clause in SPA prescribing procedures to be followed for defects liability period did not restrict house buyers' common law right to sue for damages for breach of contract — Whether procedures in that clause were intended to provide additional protection to house buyers by the HDA as social legislation

The appellant entered into a sale and purchase agreement ('SPA') with the respondent developer to buy a service suite unit in a mixed development project. The SPA was in the statutory form provided in Schedule H of the Housing Development (Control and Licensing) Act 1966 ('the HDA 1966') and the Housing Development (Control and Licensing) Regulations 1989. After collecting her keys to the unit, the appellant found many defects therein. She notified the respondent about the defects and allowed the respondent to occupy her unit for several months to carry out remedial works. The appellant claimed that not only were the defects not remedied, but the respondent had caused further damage to the place. Apart from the cost of remedying the defects, the appellant prayed for a host of other reliefs in her suit against the respondent. However, in the instant appeal against the High Court's dismissal of her claim, the appellant restricted her claim to only the following: (a) general damages for breach of the SPA; (b) RM136,720 for the cost of rectifying the defects and the additional damage caused by the respondent; (c) RM102,168.66 as liquidated and ascertained damages under the SPA for late delivery of vacant possession; and (d) RM43,720.82 for the total loss she incurred as a result of the respondent's occupation of her unit for 190 days to carry out remedial works. At the appeal hearing, the respondent argued that the appellant's claim was premature and should not be allowed because she had not followed the procedures prescribed in cl 29 of the SPA (concerning the defects liability period) after having invoked the same. In reply, the appellant said that cl 29 did not restrict her common law right to sue for damages for breach of contract as the said provision was merely an additional protection that was given to house buyers under the HDA 1966.

Held, unanimously allowing the appeal in part:

(1) Clause 29 of the SPA — which was derived from the HDA 1966 and its Regulations/Rules — was not intended to bar house buyers from asserting their common law right to claim for damages under the SPA. The clause could not be construed and applied against house buyers given that its clear intention was to be an additional protection. It could not possibly limit the rights of house buyers to claim for damages under the common law even when the purchaser had initially invoked the operation of that clause. This was construed against the backdrop of the HDA 1966 and its Regulations/Rules being a social legislation (see paras 28, 30, 32 & 35).

(2) The respondent's interpretation of cl 29 would mean that every purchaser who invoked that clause by giving the 30 days' notice to rectify defects would have automatically given up their common law right to sue for damages and would only have a cause of action if they remedied the defects on their own. This would have the effect of relieving the developer of its statutory obligation to rectify the defects. Such an interpretation was not tenable (see para 42).

(3) Based on the evidence, the court granted the appellant RM50,000 as general damages and allowed the sum of RM136,720 being the cost incurred in rectifying the defects. Since there was no late delivery of vacant possession of the unit, the RM102,168.66 claimed by the appellant under this head was dismissed. Also dismissed was her claim for RM43,720.82 as damages for the 190 days the respondent held the keys to her unit to carry out remedial works because the appellant had voluntarily given the keys to the respondent (see paras 49, 57 & 63–65).

[Bahasa Malaysia summary

Perayu telah memasuki perjanjian jual beli ('SPA') dengan pemaju responden untuk membeli unit suite perkhidmatan dalam projek pembangunan bercampur. SPA tersebut adalah dalam bentuk statutori yang diperuntukkan dalam Jadual H Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 ('APP 1966') dan Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989. Selepas mengambil kunci unitnya, perayu mendapati banyak kecacatan di dalamnya. Beliau memaklukan responden tentang kecacatan tersebut dan membenarkan responden memasuki unitnya selama beberapa bulan untuk menjalankan kerja-kerja pembaikan. Perayu mendakwa bukan sahaja kecacatan tersebut tidak dipulihkan, malah responden telah menyebabkan kerosakan tambahan kepada kediamannya. Selain daripada kos membaiki kecacatan tersebut, perayu memohon pelbagai relif lain dalam samannya terhadap responden. Walau bagaimanapun, dalam rayuan semasa terhadap penolakan tuntutan beliau oleh Mahkamah Tinggi, perayu mengehadkan tuntutannya kepada perkara berikut sahaja: (a) ganti rugi am

untuk pelanggaran SPA; (b) RM136,720 untuk kos membaikpulih kecacatan dan kerosakan tambahan yang disebabkan oleh responden; (c) RM102,168.66 sebagai ganti rugi tertentu dan ditetapkan di bawah SPA kerana kelewatan penyerahan milikan kosong; dan (d) RM43,720.82 untuk jumlah kerugian yang ditanggungnya akibat kemasukan oleh responden di untinya selama 190 hari untuk menjalankan kerja-kerja pembaikan. Semasa pendengaran rayuan, responden berhujah bahawa tuntutan perayu adalah pramatang dan tidak sepatutnya dibenarkan kerana beliau tidak mengikuti prosedur yang ditetapkan dalam klausa 29 SPA (berkenaan tempoh liabiliti kecacatan) selepas menggunakan perkara yang sama. Dalam jawapannya, perayu menyatakan bahawa klausa 29 tidak menyekat hak undang-undang am beliau untuk menuntut ganti rugi bagi pelanggaran kontrak kerana peruntukan tersebut hanyalah perlindungan tambahan yang diberikan kepada pembeli rumah di bawah APP 1966.

Diputuskan, sebulat suara membenarkan sebahagian rayuan:

(1) Klausa 29 SPA — yang diambil daripada APP 1966 dan Kaedah/Peraturannya — tidak bertujuan untuk menghalang pembeli rumah daripada menggunapakai hak undang-undang am mereka untuk menuntut ganti rugi di bawah SPA. Klausa itu tidak boleh ditafsirkan dan digunakan terhadap pembeli rumah memandangkan niatnya yang jelas adalah untuk menjadi perlindungan tambahan. Ia tidak mungkin mengehadkan hak pembeli rumah untuk menuntut ganti rugi di bawah undang-undang am walaupun pada mulanya pembeli telah menggunakan klausa tersebut. Ini ditafsirkan berdasarkan latar belakang APP 1966 dan Kaedah/Peraturannya sebagai perundangan sosial (lihat perenggan 28, 35, 32 & 30).

(2) Tafsiran responden terhadap klausa 29 bermaksud bahawa setiap pembeli yang menggunakan klausa tersebut dengan memberikan notis 30 hari untuk membaikpulih kecacatan akan secara automatik melepaskan hak undang-undang am mereka untuk menuntut ganti rugi dan hanya akan mempunyai kausa tindakan jika mereka memperbaiki kecacatan tersebut sendiri. Ini akan memberi kesan untuk melepaskan pemaju daripada kewajipan berkanunnya untuk membetulkan kecacatan. Tafsiran sedemikian tidak boleh dipertahankan (lihat perenggan 42).

(3) Berdasarkan keterangan, mahkamah membenarkan perayu RM50,000 sebagai ganti rugi am dan membenarkan jumlah RM136,720 sebagai kos yang ditanggung untuk membetulkan kecacatan tersebut. Memandangkan tiada kelewatan penyerahan milikan kosong unit tersebut, RM102,168.66 yang dituntut oleh perayu di bawah tajuk ini telah ditolak. Turut ditolak adalah tuntutannya sebanyak RM43,720.82 sebagai ganti rugi selama 190 hari responden memegang kunci unitnya

untuk menjalankan kerja-kerja pembaikan kerana perayu telah memberikan kunci secara sukarela kepada responden (lihat perenggan 49, 57 & 63–65).]

Cases referred to

City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd [1988] 1 MLJ 69, PC (refd)
Investors' Compensation Scheme Ltd v West Bromwich Building Society, Investors' Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society [1998] 1 WLR 896, HL (refd)
Jarvis v Swan Tours Ltd [1972] 3 WLR 954, CA (refd)
Kris Angsana Sdn Bhd v Eu Sim Chuan @ Eu Sam Yan & Anor [2007] 5 MLJ 13; [2007] 4 CLJ 293, CA (distd)
Macvilla Sdn Bhd v Mervyn Peter Guan Yin Hui & Anor [2019] MLJU 693; [2019] 1 LNS 949, CA (refd)
Pearce & High Ltd v Baxter and another 66 ConLR 110, CA (refd)
Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v Sri Seltra Sendirian Bhd [2008] 2 MLJ 87, CA (refd)
SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464; [2016] 1 CLJ 177, FC (refd)
Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors [2008] 4 MLJ 852; [2008] 4 CLJ 618, CA (refd)
Teh Khem On & Anor v Yoh & Wu Development Sdn Bhd & Ors [1955] 2 MLJ 663, FC (refd)

Legislation referred to

Contracts Act 1950 s 56(3)
Housing Development (Control and Licensing) Act 1966 Schedule H
Housing Development (Control and Licensing) Regulations 1989
Rules of the Court of Appeal 1994 r 5(1)

Appeal from: Suit No WA-22NCVC-606–09 of 2016 (High Court, Kuala Lumpur)

Sreether Sundara a/l Shanmuga Sundaram (with Chrishanthini Angela Regina a/p Sebastiampillai) (Murali B Pillai & Assoc) for the appellant.
Sivabalan (with Goh Wan Ping) (Mastura Partnership) for the respondent.

See Mee Chun JCA (delivering judgment of the court):

INTRODUCTION

[1] This is the claim of the appellant/plaintiff against the respondent/first defendant for the following relief as set out in para 60 of its re-amended

statement of claim dated 11 July 2019:

60.1 An order that the first defendant identify and remedy the source of the smell in the 2 bathrooms and the leaks to all the window in the plaintiff's unit;

60.2 The cost of the repair of the remaining defects in the plaintiff's unit be assessed and paid to the plaintiff;

60.3 Damages for late delivery of the unit;

60.4 Damages for late delivery of the common facilities;

60.5 Damages for failing to build the access road to Jalan Putra;

60.7 Damages for failing to provide a safe and legal pedestrian access;

60.8 A declaration that the running a hotel in the development is in breach of the Agreement;

60.9 Damages for running a hotel in the development;

60.10 Damages for breach of the Agreement;

~~*60.11 Further and/or in the alternative, damages for conspiracy to injure*~~;

~~*60.12 Damages for breach of statutory duty*~~;

60.13 Further and/or in the alternative, general damages;

60.14 Exemplary damages;

60.15 Interest at a rate of 5%pa from the date of accrual of each head of damage until full and final settlement; and

60.16 Costs.

[2] The appellant was the purchaser of a service suite unit, A32–07 ('the unit'), developed by the respondent. The respondent is a property developer of the development known as Regalia, upon which the unit sits, which is a mixed development consisting of service suites, recreational, commercial/retail and car park. There were other defendants, namely the second to the eleventh, against whom the claim was subsequently withdrawn. The second defendant was the Joint Management Body ('JMB') of Regalia.

[3] The appellant's claim was dismissed on 23 July 2019 by the High Court judge ('HCJ'). A notice of appeal dated 21 August 2019 was filed against part of the decision.

ORDER DATED 21 SEPTEMBER 2021

[4] On 21 September 2021, this court had ordered as follows:

The GOJ cannot form part of the Record of Appeal in light of the letter and the WhatsApp communication. It appears that we cannot conclusively confirm that it was prepared before the Judge has retired. On the notes of proceeding, we are directing parties/appellant to file notes of proceedings from the Judge's note certified by the Registrar.

[5] Thus, when the appeal was heard before us on 10 March 2022, we proceeded on the basis of there being no grounds of judgment. A

BACKGROUND FACTS

[6] The appellant and the respondent entered into a sale and purchase agreement of the unit on 26 October 2010 (SPA). The SPA is in the statutory form as provided in Schedule H of the Housing Development (Control and Licensing) Act 1966 ('the HDA 1966') and the Housing Development (Control and Licensing) Regulations 1989. B C

[7] By letter dated 3 September 2012, the respondent notified the appellant that the unit was complete and vacant possession was deemed granted upon the expiry of 14 days of the date of the letter. The appellant collected the key to the unit on 24 October 2012. D

[8] According to the appellant when she took the key, many defects were found and the respondent retained a set of keys to carry out rectification work. The defects were not rectified and fresh damage was caused. On 2 May 2013, the respondent returned the keys it retained. Subsequently, new defects were apparent and notified to the respondent by various defects lists dated 4 May 2013, 29 May 2013 and 19 June 2013 and by two letters dated 14 August 2014 and 15 September 2014. The appellant said she was unable to pursue the matter due to health, financial and family reasons. Sometime in April 2016, the matter of the defects was revived. With no action taken, this suit was filed on 23 September 2016. E F

THE APPEAL

[9] As noted earlier, the whole of the claim was dismissed. This is the appeal against part of the decision in dismissing the claim as follows: G

(a) costs of rectification of defects and additional damage in the appellant's unit amounting to RM136,720;

(b) damages for breach of contract between the appellant and respondent for: H

(i) losses suffered by the appellant for the period the respondent retained possession of the appellant's unit for the rectification of defects between 24 October 2012 to 2 May 2013 amounting to RM43,720.82; I

(ii) failure to rectify defects in the appellant's unit; and

(iii) additional damage caused to the appellant's unit during attempts to rectify the defects.

(c) samages for late delivery of vacant possession from 1 July 2011 to 17 September 2012 amounting to RM102,168.66;

(d) further and/or in the alternative, general damages; and

(e) interest at a rate of 5%pa on all sums awarded from the date of accrual until full and final settlement.

[10] The appeal may thus be broadly categorised as follows:

(a) damages for breach of contract arising from the defects and additional damage comprising repair and rectification costs, damages for the actual damage to the unit, loss suffered due to the respondent retaining the key while attempting to remedy the defects and the stress and anxiety caused to the appellant as a result of the defects and additional damage; and

(b) damages for delay in handover of vacant possession from 1 January 2011 until 17 September 2012 amounting to RM102,168.66.

OUR DECISION

[11] We had allowed the appeal in part with regard to the cost of rectification of defects and general damages for stress and anxiety. We had dismissed the claim for delay in delivery of vacant possession ('VP') and the claim for damages for the period when the respondent had retained the key to the unit. We now give our reasons.

COST OF RECTIFICATION

[12] This issue gives rise to the legal question of whether cl 29 SPA bars the appellant from making a claim against the respondent.

[13] The respondent contended cl 29 operated as a bar because the appellant had earlier invoked the clause and is obliged to comply with the steps outlined in the aforesaid clause. The claim was premature where it failed to satisfy the condition precedent ('CP') in cl 29(1) and (2). It was the appellant's contention that cl 29 does not bar a common law claim for damages for breach of contract.

[14] The first contention of the appellant was this issue was not raised in the defence where the defence was essentially a denial of liability. It was submitted by the appellant and with reference to the notes of proceedings in CCB Vol 4/963–965, 986–988,1032, and 1038–1044 that this issue weighed heavily on the HCJ's mind. This was apparent from the HCJ's questions and the HCJ took the view that a claim for defects may only be brought if the purchaser complied with the terms of the SPA.

[15] As there are no grounds of judgment prepared by the HCJ, we are unable to fathom the reasoning of the HCJ in dismissing this part of the claim, and indeed the whole claim. A

[16] We refer to the order of the court given on 21 September 2021 that the grounds prepared by the HCJ cannot form part of the record of appeal as it could not be conclusively confirmed that that it was prepared before the HCJ had retired. B

[17] In any event, all appeals shall be by way of re-hearing (r 5(1) of the Rules of the Court of Appeal 1994). We therefore proceeded without reference to the grounds of the HCJ. C

[18] On the contention that the issue of cl 29 was not raised in the defence, we are of the considered opinion that a legal issue can be raised during an appeal. We note too this issue was canvassed extensively in the High Court. D

Interpretation of cl 29 SPA

[19] Clause 29 SPA provides as follows: E

29 Defect liability period

(1) Any defect, shrinkage or other faults in the said Parcel or in the said Building or in the common property which shall become apparent within a period of twenty-four (24) calendar months after the date the Purchaser takes vacant possession of the said Parcel and which are due to defective workmanship or materials or; the said Parcel or the said Building or the common property not having been constructed in accordance with the plans and description as specified in the First and Fourth Schedule as approved or amended by the Appropriate Authority, shall be repaired and made good by the Vendor at its own cost and expense within thirty (30) days of the Vendor having received written notice thereof from the Purchaser. F G

(2) If the said defect, shrinkage or other faults in the said Parcel or the said Building or the said common property have not been made good by the Vendor within the said period of thirty (30) days under subclause (1), the Purchaser shall be entitled to carry out the works to repair and make good the said defect, shrinkage or other faults himself and to recover from the Vendor the costs of repairing and making good the same and the Purchaser may deduct such costs from any sum which has been held by the Vendor's solicitors as stakeholder for the Vendor under item 5 of the Third Schedule provided that the Purchaser shall, at any time after the expiry of the said period of thirty (30) days, notify the Vendor of the cost of repairing and making good the said defect, shrinkage or other faults before the commencement of the works and shall give the Vendor an opportunity to carry out the works himself within fourteen (14) days from the date the H I

Purchaser has notified the Vendor of his intention to carry out the said works and provided further that the Purchaser shall carry out and commence the said works as soon as practicable after the Vendor's failure to carry out the said works within the said period of fourteen (14) days. In such an event, the Vendor's solicitors shall release such costs to the Purchaser from the stakeholder sum held by the Vendor's solicitor under item 5 of the Third Schedule within fourteen (14) days after receipt by the Vendor's solicitors of the Purchaser's written demand specifying the amount of such costs.

(3) Subject to subclause (2), where the Purchaser has, before the expiry of eight (8) months or twenty-four (24) months after the date the Purchaser takes vacant possession of the said Parcel as set out in item 5(a) and item 5(b) respectively of the Third Schedule, duly served on the Vendor's solicitors a copy of the written notice from the Purchaser to the Vendor under subclause (1) to rectify the said defect, shrinkage or other faults in the said Parcel or the said Building or the said common property, the Vendor's solicitors shall not release to the Vendor the relevant sum held by the Vendor's solicitors as stakeholder pursuant to item 5(a) and/or item 5(b) of the Third Schedule, as the case may be, until the Vendor's solicitors shall have received a certificate signed by the Vendor's architect certifying that the said defect, shrinkage or other faults in the said Parcel or the said Building or the said common property have been repaired and made good by the Vendor.

SUBMISSIONS OF THE APPELLANT

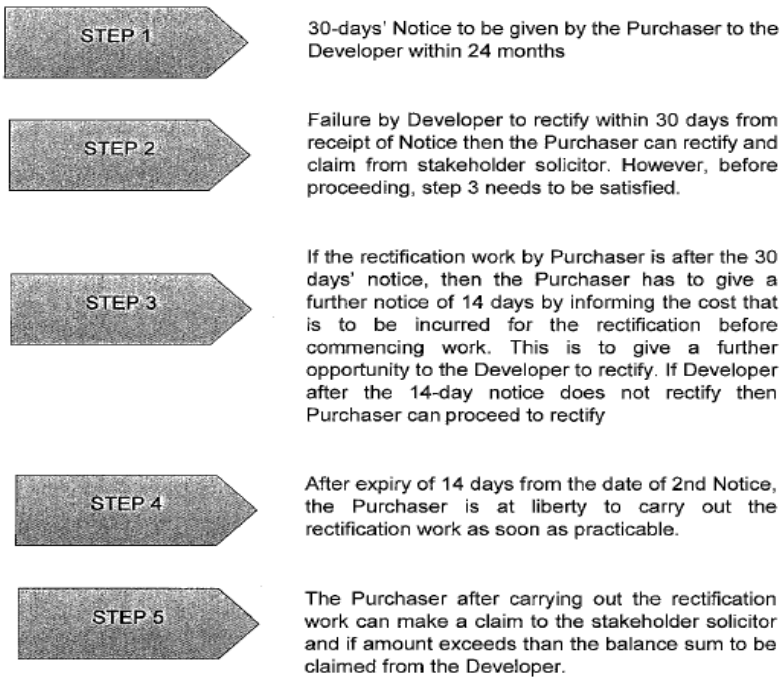
[20] It was submitted by the appellant that cl 29 being part of Schedule H of the Housing Development (Control and Licensing) Act 1966 which is a social legislation cannot be interpreted to limit or bar a purchaser's common law right to pursue a claim against the developer.

[21] Clause 29 is a defect liability clause which specifies the manner in which the defect liability sum may be demanded by a purchaser. It creates an entitlement for the purchaser to repair the defects and claim the cost from the defect liability sum which is set aside for this purpose. It is not the basis on which a cause of action is founded in respect of defects or damage.

[22] Reference was made to *Pearce & High Ltd v Baxter and another* 66 ConLR 110 for the proposition that the provision on defect liability is an additional remedy and is not to release the contractor from his ordinary liability and it would require very clear words to debar the owner from exercising his ordinary rights of suing. A decision of this court in *Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v Sri Seltra Sendirian Bhd* [2008] 2 MLJ 87 was referred to where a similarly worded clause to cl 29 was said to be an additional protection for house buyers without affecting or limiting their rights under common law.

SUBMISSIONS OF THE RESPONDENT

[23] In summary, the respondent submitted that the SPA is a statutory sales contract from which there can be no departure. The manner for a claim for rectification has been spelled out for which the respondent reproduced in a diagram as follows:


STEP 1
30-days' Notice to be given by the Purchaser to the Developer within 24 months
STEP 2
Failure by Developer to rectify within 30 days from receipt of Notice then the Purchaser can rectify and claim from stakeholder solicitor. However, before proceeding, step 3 needs to be satisfied.
STEP 3
If the rectification work by Purchaser is after the 30 days' notice, then the Purchaser has to give a further notice of 14 days by informing the cost that is to be incurred for the rectification before commencing work. This is to give a further opportunity to the Developer to rectify. If Developer after the 14-day notice does not rectify then Purchaser can proceed to rectify
STEP 4
After expiry of 14 days from the date of 2nd Notice, the Purchaser is at liberty to carry out the rectification work as soon as practicable.
STEP 5
The Purchaser after carrying out the rectification work can make a claim to the stakeholder solicitor and if amount exceeds than the balance sum to be claimed from the Developer.

[24] According to the respondent, the appellant had just before the expiry of the defect liability period triggered cl 29 when by letters dated 14 August 2014 (encl 32/37) and 15 September 2014 (encl 32/32), the 30 days' notice was given. Having given the notice, the appellant was obliged to carry out the rectification work and then claim from the stakeholder solicitor. Where the amount exceeds the stakeholder sum, the appellant will then claim from the respondent. In this instance, the work was not carried out where there was only a quotation. Therefore, the present claim is premature where the CP was not complied with. The appellant had also not given the further 14 days' notice to the respondent as required under cl 29(2) and provide the respondent the further opportunity to rectify. The appellant cannot now circumvent the statutory provisions and is barred from making this claim.

[25] Reference was made to *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464; [2016] 1 CLJ 177 which approved the

principles of contractual interpretation in *Investors' Compensation Scheme Ltd v West Bromwich Building Society, Investors' Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society* [1998] 1 WLR 896. Essentially, it is that words should be given their natural and ordinary meaning and words ought to yield to business common sense.

[26] In *Housing Development Law* by SY Kok, it was stated that 'the defect liability clause cannot function until and unless some procedural steps as stipulated therein, have been complied with by an aggrieved purchaser'.

[27] It was also contended that statutory legislation supersedes common law as laid down in *Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors* [2008] 4 MLJ 852; [2008] 4 CLJ 618.

FINDINGS

[28] A careful consideration of cl 29 SPA would show that it is not intended to bar a purchaser from asserting the common law rights to claim for damages under the SPA. The legal framework of cl 29 is such that it is a but a mechanism for the purchaser to ensure that defects which shall become apparent within 24 months after VP are rectified. This is provided the 30 days' notice is received.

[29] Towards this end, there are procedures as to how the defects are to be rectified, either by the vendor or by the purchaser. In that sense, we do not disagree with the learned author SY Kok that the defect liability clause cannot function until and unless some procedural steps are complied with by an aggrieved purchaser. Ultimately, it is the purchaser who is to be protected, where the defects are to be rectified either at the vendor's cost or by the purchaser. Where the purchaser does the rectification, such costs are to be deducted from the stakeholder sum set aside for this purpose.

[30] There is no provision embedded in cl 29 to bar the purchaser from looking to common law for relief even when the purchaser had initially invoked the operation of the clause. This is especially so when the rectification work was not to the appellant's satisfaction and despite the appellant's various defect lists dated 4 May 2013, 29 May 2013 and 19 June 2013 and by two letters dated 14 August 2014 and 15 September 2014. These two letters were also the letters referred to by the respondent where the appellant is said to given the notice to rectify.

[31] We are fortified in arriving at this finding with reference to *Raja Lob Sharuddin* where at pp 102–104, the following was stated:

DEFECT LIABILITY PERIOD

[26] The defendant strenuously contended that the plaintiffs' action should fail because the defects were discovered after the expiry of the defects liability period. The learned judge had also accepted this as a strong ground to reject the plaintiffs' claim. The defect liability clause is contained under cl 23 of the sale and purchase agreement which reads:

> 23. Any defect, shrinkage or other faults in the building which shall become apparent within a period of twelve (12) of vacant possession to the Purchaser and which are due to defective workmanship or materials or the said Building not having been constructed in accordance with the said specifications and plans as approved by the Appropriate Authority (amended for unamended as the case may be) shall be repaired and made good by the Vendor at his own cost and expense within one month of its having received written notice thereof from the Purchaser and if the said defects, shrinkage or other faults in the Building have not been made good by the Vendor, the Purchaser shall be entitled to recover from the Vendor the costs of making good the same and the Purchaser may deduct such costs from any sum which has been held by the Vendor's solicitor as stakeholder for the Vendor;
>
> Provided that the Purchaser shall at any time after the expiry of the said period of one month notify the Vendor of the cost of carrying out any works to make good the said defects, shrinkage of other faults before the commencement of the works and shall give the Vendor an opportunity to carry out the works himself within fourteen days from the date the Purchaser has notified the Vendor of his intention to carry out the said works.

[27] The question that we have to determine is whether this cl 23 should be construed and applied against purchasers of houses. To do that it would be incumbent upon us to trace the purpose for which cl 23 was originally created. It began with the passing of the Housing Developers (Control and Licensing) Act 1966 and the Regulations made thereunder. In 1982 the Housing Developers (Contract and Licensing) Regulations came into force. And reg 12(1) of Regulation 1982 provides that every contract of sale for the sale and purchase of a housing accommodation together with the sub-divisional portion of land appurtenant thereto shall be in the form as prescribed in Schedule E. Regulation 12(1) further provides that no amendment to any such contract of sale shall be made except on the ground of hardship or necessity and with the prior approval of the controller. In other words all the provisions in the sale and purchase agreement are actually statutory requirements which must be strictly complied with cl 23, particular, is meant to be an additional protection for house buyers, without effecting or limiting their rights under the common law. This was the ruling made by the Privy Council in *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1988] 1 MLJ 69. In that case Lord Templeman said (at p 72):

> But the Act of 1966 and Rules were designed to improve and supplement common law remedies and do not expressly or by implication deprive a litigant of a contractual remedy which is not dealt with under the Rules.

[28] In the Federal Court case of *Teh Khem On & Anor v Yoh & Wu Development Sdn Bhd & Ors* [1955] 2 MLJ 663, Peh Swee Chin FCJ said (at p 671):

Again, the vendor/builder and in fact, other defendants, all have joined in a common submission by way of defence that the damage occurred after the defect liability period mentioned in cl 23 of P1.

I shared the view espoused by Lord Denning in *Hancock & Ors v Bui Brazier Ltd* [1966] 2 All ER 901; [1966] WLR 1317, to the effect that such cl similar to cl 23 in our instant appeal about making good structural defects discovered within six months would not take away the right to sue in respect of such defects which were not discoverable with such six months, and that further in regard those defects discovered within the six months, the provision of an express remedy of making good the same defects will not ipso facto take away the rights of any purchaser which normally follow at common law in the case of a breach of contract. It is pertinent to mention that our cl 23 provides for 12 months instead of six months. The same principles would apply. Thus the said line of defence also fails.

[29] On the basis of the ruling made by the above two cases the reliance of the defect liability period as a defence by the defendant should be totally rejected. Here again the learned judge had misdirected himself in law.

[32] We have found it necessary to reproduce the above paras *in extenso* as we adopt *in toto* the principles stated therein that cl 23 which is similar to our cl 29, is intended to be an additional protection to house buyers without affecting their rights under the common law. Although the respondent sought to distinguish the case in that the claim there was filed after the defect liability period, it cannot detract from the clear principle established that the clause in question could not be construed and applied against house buyers given that its clear intention was to be an additional protection and could not possibly limit the rights of house buyers under common law. This was construed against the backdrop of HDA 1966 and its Regulations/Rules being a social legislation.

[33] In *Raja Lob Sharuddin*, reference was made to a Privy Council case of *City Investment* where it was said 'the Act of 1966 and the Rules were designed to improve and supplement common law remedies and do not expressly or by implication deprive a litigant of a contractual remedy which is not dealt with under the Rules' (p 72). The respondent similarly sought to distinguish that case on it being for specific performance and not defect liability. Similarly, we say that it is the principle that is relevant, namely the intention of the HDA 1966 which is the premise of our SPA and that of cl 29.

[34] *Teh Khem On* which was also referred to in *Raja Lob Sharuddin* stated that cl 23 (our cl 29) would not take away the right of the purchaser to sue for defects not discoverable within the defect liability period nor the right to sue for breach of contract at common law for defects discovered within that period (p 671). Here, contrary to the respondent's submission, this was a statutory contract provision where mention was made to cl 23 which is the very same cl

23 in *Raja Lob Sharuddin*.

[35] We therefore have this trilogy of local cases from the Privy Council to the Federal Court to this court which have laid down the principle that a provision of SPA derived from the HDA 1966 and its Regulations/Rules, such as our cl 29, cannot possibly limit or restrict the common law right to sue for breach of contract. To do so would derogate from the intention of such a clause being an additional protection for purchasers.

[36] A similar stance was also taken by the English Court of Appeal in *Pearce & High Ltd*. This involved cl 2.5 on defects liability which provided as follows:

> Defects liability
>
> 2.5 Any defects, excessive shrinkages or other faults which appear within there months ... Of the date of practical completion and are due to materials or workmanship not in accordance with the Contract or frost occurring before practical completion shall be made good by the Contractor entirely at his own cost unless the Architect/the Contract Administrator shall otherwise instruct.

[37] At pp 115–116, this was said:

> I therefore agree with the judgment of his Honour Judge Stannard in *William Tomkinson v St Michael's Parochial Church Council*. He held as follows (at p 326):
>
> > Where [the defects] are not remedied by the contractor within the construction period, there is nothing in the wording of cl 2.5 to suggest that it is intended to exclude the employer's ordinary right to damages for breach of contract, including the right to recover the cost of remedying defective workmanship. 'It requires very clear words to debar a building owner from exercising his ordinary rights of suing if the work done is not in accordance with the contract' — per Edmund Davies LJ in *Billyack v Leyland Construction Co Ltd* [1968] 1 All ER 783 at p 787. 'In construing such a contract, one starts with the presumption that neither party intends to a abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption' — per Lord Diplock in *Gibert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 at p 717H. In my judgment cl 2.5 is not such a provision exempting the contractor from liability, except in so far as it is part of an overall contractual scheme which, in the specific situation postulated by Lord Diplock, leads to the construction that nominal damages are irrecoverable. Otherwise the true function of cl 2.5 is in my judgment firstly to confer a remedy for defective works on the employer, ie the right to require the contractor to make them good. Such a provision is generally to be regarded as providing an additional remedy for the employer, and not as releasing the contractor from his ordinary liability to pay damages for defective works: *Hancock v BW Brazier (Anerley) Ltd* [1966] 2 All ER 901 per Lord Denning MR at p 904F-I *Adams v Richardson & Starling Ltd* [1969] 2 All ER 1221 ...

[38] It was held that cl 2.5 did not bar a claim for the recovery of damages in respect of defects which became apparent during the defect liability period (p 118). Although cl 2.5 is not as detailed as our cl 29, it is similar in requiring defects to be made good by the contractor. The principle is nevertheless that such a clause cannot bar a common law claim for breach of contract.

[39] The principle that the natural and ordinary meaning is to be ascribed to contracts as laid down in *SPM Membrane* and *Investors Compensation Scheme* has not been offended. All that is said here is that the purchaser still has a common law right to claim for breach of contract. This is all the more when there is nothing in cl 29 which expressly takes away that common law right.

[40] The respondent had relied on *Sentul Raya* for the proposition that parties to a contract in Form H, such as this case, cannot contract out of the scheduled form. This has to be considered in the context of the passage at p 626:

> [8] In our opinion there is no merit in the appellant's argument. So far as s 56(3) of the Contracts Act 1950 is concerned, it deals with contracts generally. The contract which has fallen for construction in the present cases is a special contract. It is prescribed and regulated by statute. While parties in normal cases of contract have freedom to make provisions between themselves, a housing developer does not enjoy such freedom. Hence, parties to a contract in Form H cannot contract out of the scheduled form. Terms more onerous to a purchaser may not be imposed. So too, terms imposing additional obligations on the part of a purchaser may not be included in the statutory form of contract. It follows that the requirement of notice under s 56(3) which is an additional obligation to the detriment of the purchaser cannot be imposed on the respondents here in the light of the statutory scheme under the Act. This is evident in the language of cl 22(2). On its proper construction, the clause makes a housing developer immediately liable to a purchaser in liquidated damages once the date for completion passes. Put differently, cl 22(2) excludes the operation of s 56(3). This is another reason for holding that s 56(3) of the Contracts Act 1950 does not apply in cases falling under the Act.

[41] This was a case where it was argued that time was at large and if any of the respondents wished to make time of the essence again, it had to give notice under s 56(3) of the Contracts Act 1950. Refer to para 6. It was in that context this court stated there can be no contracting out. More telling, it was said that terms more onerous to a purchaser may not be imposed. To that extent it can therefore be said that to limit the purchaser from pursuing a common law claim will be an onerous term.

[42] The respondent's interpretation would mean that every purchaser who invokes cl 29 by giving the 30 days' notice to rectify defects, has automatically given up its common law right and would only have a cause of action if they

remedied the defects on their own. This would have the effect of the developer being relieved of its statutory obligation to rectify the defects. Such an interpretation cannot be tenable.

[43] To conclude on this point, we say that cl 29 cannot possibly limit or restrict the common law right to sue for breach of contract. To do so would derogate from the intention of such a clause being an additional protection for purchasers.

Proof of the claim

[44] We find that the appellant had given evidence on the defects in her unit which were supported by the various defects lists dated 4 May 2013 (encl 32/67–68), 29 May 2013 (encl 32/70–73) and 19 June 2013 (encl 35/24–25) and essentially unchallenged. Further, there were the notices to rectify dated 14 August 2014 and 15 September 2014 (encl 32/26–33) referred to by the respondent. There is also the evidence of the appellant where the respondent's customer relations manager met her with two contractors to view the unit in April 2016 (Q&A 85–86). There was also an email from one Shukry with a defects list to fill up, which was duly done on 25 May 2016 as evident from encl 32/42–45. The appellant had also explained why she was unable to pursue the matter of the defects for a while due to health, financial and family issues (Q&A 87–90).

[45] The cost of rectification amounts to RM127,000 and was supported by the quotation in P98 (encl 35/19–21) and the evidence of the director of the company (PW4) that provided the quote. We find it not material the address of the company was a residence or that it was dormant company. PW4 explained the reason it was dormant as it was formed with the idea of shifting his existing businesses.

[46] Issues raised by the respondent in relation to the odour from the second bedroom being the appellant's responsibility with the pipes serving the unit being common property are unfounded. The odour had been raised in defect list dated 14 June 2014 (encl 32/35). PW4 had explained the reason for the odour was improper installation of the toilet. The pipes being common property bear no relation to odour.

[47] The further issue in respect of leaks to the windows was that the windows are common property and that the JMB ought to be the party to be sued. We agree this was an unpleaded defence and the defence was now from denial to another party being liable. Here, the claim against the JMB had been withdrawn and it is prejudicial for such an issue to be raised now.

[48] Added to this head of claim was the cost of accommodation for the period of rectification of three months at RM3,240 per month equals RM9,720. This is as a consequence of the rectification. The evidence of the appellant and PW4 was also unchallenged.

[49] The total damages for this head of claim would be RM136,720. Accordingly, we allow this part of the appeal.

GENERAL DAMAGES FOR FAILURE TO RECTIFY DEFECTS AND ADDITIONAL DAMAGE CAUSED

[50] This part of the claim is with reference to para 45 of the re-amended statement of claim, in particular subparas 45.3. 45.4 and 45.6 relating to stress, anxiety, time and resources to chase the respondent to fix the defects and having to put up with the unremedied defects and additional damage. The aforesaid paragraphs state as follows:

> 45. As a result of the breaches stated at the paragraphs and sub-paragraphs of paragraphs 28 to 44 above, the plaintiff has been put to loss and damage, including, but not limited to the following:
>
> 45.1 The plaintiff waited an additional 2 years before she and her family could live in the home she had purchased.
>
> 45.2 The plaintiff incurred unnecessary rental costs and was forced to move house twice.
>
> 45.3 The plaintiff and her family suffered unnecessary stress and anxiety.
>
> 45.4 The plaintiff was forced to expend time and resources to chase the first defendant and their contractors to fix the defects.
>
> 45.5. The plaintiff and her family have had to put up with the unremedied defects and the further damage caused by the 1st defendant's contractors since October 2012 (and continuing).
>
> 45.6 The plaintiff has been forced to underwrite the hotel business of the first defendant through the payment of maintenance fees.

[51] We agree that with the appellant that *Jarvis v Swan Tours Ltd* [1972] 3 WLR 954 and *Macvilla Sdn Bhd v Mervyn Peter Guan Yin Hui & Anor* [2019] MLJU 693; [2019] 1 LNS 949 stand for the proposition that one may claim for distress, anxiety and hardship for a breach of contract. Refer to para 41 of *Macvilla*, which also referred to *Jarvis*, as follows:

> [41] Both the limbs are related to special as well as general damages. As far as the special damages are concerned, it is well established it must be specifically pleaded and proved. Thus, the 'actual damage' concept envisaged in s 74 is easier for courts to assess when it relates to special damage and proved according to law. However, on the issue of general damages, there must be evidence of actual damage or loss.

> Courts have also said that damage will not be refused by the mere fact that it is impossible to assess them with precision. Thus, strict proof is not a requirement in the pleading sense under s 74. The illustrations to s 74 will also support that strict proof is related to actual loss and damage and not to the quantum. The issue of quantum must be determined by the court after hearing both parties (see *Javis v Swan Tours Ltd* [1973] QB 233). However, the strict rule is that a person who has not suffered loss or damage in consequence of a contractual breach, is not entitled to compensation. To emphasise the point of actual damage, s 74(2) as well as subsection (3) emphasises that claim which are remote, indirect loss or more specifically economic loss are not recoverable. These propositions are supported by the illustrations to the section itself.

[52] Here, the appellant had every expectation the unit would be suitable to reside in and yet had been put through much stress and anxiety in trying to ensure the respondent rectified the defects. Her health has been affected. The state of affairs started in October 2012 even until now. There was also further damage caused by the attempt to rectify.

[53] *Macvilla* also stands for the proposition that for general damages, there must be evidence of actual loss or damage and it will not be refused on the fact it is impossible to assess them with precision (para 41). The strict proof requirement is related to actual loss and damage and not to quantum.

[54] It was submitted a sum of RM700,000 would be suitable compensation. Reference was made to *Kris Angsana Sdn Bhd v Eu Sim Chuan @ Eu Sam Yan & Anor* [2007] 5 MLJ 13; [2007] 4 CLJ 293 where RM1m was awarded for general damages and this court said there was ample evidence that the health of the second respondent had taken a dive, due to the continuous and persistent mental distress of seeing the home slowly disintegrating. The case involved the construction of two blocks of twenty storey building adjacent to the second respondent's property.

[55] The damage to the property and the fear and suffering of the second respondent were set out in para 13 of that case. So for instance, there were cracks at various places of the property, the ground in the garden area was substantially damaged, and there was a gap left on different levels as the ground had subsided, the concrete wall surrounding and fencing the house was cracked and tilting, there were shifts, sinking and subsiding in various places leaving large cracks and gaps, the columns supporting the house cracked and tilted, the alignment of the doors and windows of the house became warped and could not be properly shut and opened, the sewerage system gave way and there were leaking pipes. In the words of the second respondent this led to he and the family 'always being afraid of the house collapsing' (A11.2.1), 'the fear for our safety due to the threat of the house collapsing' (A21.1) and finally 'we had no choice but to move out of the house for fear of our safety' (A22.2).

[56] Although we are of the opinion the appellant is entitled to damages, we do not think that the appellant's case falls anywhere near *Kris Angsana*. The defects in this case were matters on flooring, tiling, windows, toilets, water sewage and foul odour. Q&A87–90 sets out the appellant's family, health and financial problems and the difficulty in finding a contractor.

[57] We award an amount of RM50,000. To that extent this part of the appeal is allowed.

Damages for delay in late delivery of vacant possession

[58] We find that this part of the claim is premised on the misrepresentation by the respondent's sales representative that the unit was due to be completed by June 2011. This is clear from paras 20.1 and 28 of the re-amended statement of claim where it is stated that in breach of the representation, the respondent failed to deliver vacant possession by end June 2011.

[59] Paragraph 20.1 stated that the respondent's sales representative made the following additional representations, inter alia that, 'the project was due to be completed at the end of June 2011'. Paragraph 28 in turn stated:

> 28. In breach of the representations of their sales representative, the 1st defendant failed to deliver vacant possession by the end of June 2011. As a result of this delay, the plaintiff was put to inconvenience, stress and loss.

[60] The appellant now seeks to rely on para 25 that the brochure forms the terms of the agreement for the purchase of the unit. Although the brochure does contain a footnote that the project would be completed in February 2011, the context of how the brochure was pleaded is relevant. It was never pleaded specifically the brochure contained the completion date which is now relied on. All that was pleaded in para 15 was that the brochure contained the following express and/or implied representations as stated in paras 16 to 19.

[61] Refer to para 15 as follows:

> 15. At the showroom, the plaintiff and her husband were shown a brochure of the project known as Regalia Service Apartment. The brochure contained, inter alia, the following express and/or implied representations as stated in paras 16 to 19 below.

The paras 16 to 19 relate to the facilities and services of the project, that the units were semi furnished, the entrances and exits and that the project was residential.

[62] The evidence of the appellant was there was no misrepresentation from the respondent's sales representative. This can be found in the notes of proceedings (encl 40/48–49):

SVB: At the showroom, who did you meet?

CHRISHAN: Mr Steven Tham

SVB: You agree with the name of Mr Steven Tham, first word appears only in your witness statement? Nowhere in your Pleadings, correct?

CHRISHAN: I think you are right, yes

SVB: So your allegation is that Mr Steven Tham misrepresented to you on the completion date in respect of Regalia, correct?

CHRISHAN: My allegation was, I didn't say he misrepresented. I don't think he was misrepresenting to me. I believe he thought that it would be completed when he told me which was end June 2011. I don't think he deliberately ... it's not my Pleading that I was misled as to the completion date. It's my Pleading that the project was delayed.

SVB: So you agree that there was no misrepresentation on the part of Mr Steven Tham to you in respect of the completion date of Regalia, correct?

CHRISHAN: In that he told me, because my evidence is that he said completion date end June.

SVB: Ms Chrishanthini?

CHRISHAN: Yes?

SVB: Question was posed to you.

CHRISHAN: Yes.

SVB: It's always a yes or no, alright?

CHRISHAN: Ok.

SVB: If you cannot fall within yes or no.

CHRISHAN: Alright, so was there a misrepresentation by Mr Steven Tham on 26.09.2010 on the completion date, I do not believe so.

[63] As the pleaded case was misrepresentation of which there was none and as per cl 25 of the SPA, the date of vacant possession of 24 October 2012 was within the 36 months from the date of the SPA. It is not disputed that by letter dated 3 September 2012 (encl 31/101) the respondent notified the appellant that the unit was complete and vacant possession was deemed granted upon the expiry of 14 days of the date of the letter. The appellant collected the key to the unit on 24 October 2012.

[64] This part of the appeal for a claim of RM 102,168.66 for late delivery of liquidated and ascertained damages is dismissed.

Damages for the period when the respondent held on to the appellant's keys for 190 days for the purpose of remedying the defects

[65] During this period, the appellant said she had to bear the loan and rental cost. The damages of RM43,720.82 is calculated on the basis of liquidated and ascertained damages as the appellant was not able to occupy the unit until the keys were returned. We find no basis to the claim as the keys were given voluntarily to the respondent.

[66] This part of the appeal is dismissed.

CONCLUSION

[67] The appeal is partly allowed and partly dismissed as above stated. We award costs of RM15,000 to the appellant subject to allocatur.

Appeal allowed in part.

Reported by Ashok Kumar